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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2673/2015*, **

Communication submitted by:	M.S.P.-B. (represented by W.G. Fisher)
Alleged victims:	The author and her daughter, S.P.
State party:	Netherlands
Date of communication:	10 June 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 10 November 2015 (not issued in document form)
Date of adoption of Views:	25 July 2018
Subject matter:	Denial of child benefit for applicant without residence permit
Procedural issue:	Victim status
Substantive issues:	Right to family life; discrimination on the ground of other status
Articles of the Covenant:	23, 24 (1) and 26
Article of the Optional Protocol:	1

1. The author of the communication is M.S.P.-B., born on 25 August 1972. She is submitting the communication on her own behalf and that of her minor daughter, S.P., born on 10 April 2001. At the time of the submission of the communication, the author and her daughter were nationals of Suriname; they have since acquired Dutch citizenship. The author alleges a violation by the State party of her and her daughter's rights under articles 23, 24 (1) and 26 of the Covenant. The Optional Protocol entered into force for the Netherlands on 11 March 1979. The author is represented by counsel.

The facts as submitted by the author

2.1 The author arrived in the Netherlands with her daughter on 19 October 2005 on a visitor's visa valid for 90 days. Since their arrival in the Netherlands, the author and her

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

daughter have lived with the author's father, who is a resident of the Netherlands and was living in the State party at the time the author and her daughter arrived. After a medical examination in the Netherlands, the author's daughter was diagnosed with a rare metabolic deficiency that prevents her brain from processing enough glucose. Since the diagnosis, she has been following a ketogenic diet which ensures that her brain tissue can process ketones instead of glucose. However, the glucose deficiency has caused permanent physical and psychosocial disability.[1] The author would have returned to Suriname, but the food necessary for her daughter's ketogenic diet is not available there. She notes that medical advisers and doctors have stated that without access to the necessary diet, her daughter would suffer a medical emergency in the form of brain damage or other forms of serious physical or mental deterioration, or could even die.

2.2 On 13 June 2006, the author applied for a residence permit for her daughter on medical grounds. A period of continuous proceedings regarding her daughter's health situation and her residence status followed. During this period, the author and her daughter were lawfully in the Netherlands under the status "pending proceedings". On 16 September 2009, they were given residence permits valid for one year. In 2010, they were granted Dutch citizenship.

2.3 While the application for residence was pending, on 11 June 2006, the author applied for a "general child benefit" for her daughter. The general child benefit is paid to all families with children and is paid to the parent in the child's interest and for his or her benefit. On 13 June 2008, the author submitted a new request for the general child benefit. The request was denied by the Social Insurance Bank on 10 July 2008. The author appealed this decision to the District Court of Amsterdam, claiming that the denial of her application for the benefit for the second quarter of 2007 until the third quarter of 2008 had been due to an unlawful distinction based on residence status. On 9 December 2009, the District Court dismissed the author's appeal, finding that because the author did not have a residence permit for the period in question she was not entitled to the child benefit. The District Court ruled that, for non-nationals, holding a residence permit was a condition for granting the general child benefit. The author's subsequent appeal against the decision of the District Court was joined with eight other similar cases by the Central Appeals Court for Public Service and Social Security Matters. On 15 July 2011, the Central Appeals Court quashed the decision of the District Court and the Social Insurance Bank and ordered the latter to review its decision in view of the Central Appeals Court's finding that the General Child Benefit Act drew a distinction based on nationality and residence status for entitlement to benefits. It held that there was no justification for exclusion of a person from general child benefits on the grounds of his or her immigration status if (a) the applicants had lived in the State party for a long period with the knowledge of the State party's authorities; (b) they were lawfully present in the State party, with a status of "pending proceedings"; and (c) they had established such a bond with the Netherlands that they could be considered to be residents of the country. The Central Appeals Court also held that when those conditions were satisfied, the exclusion of parents from general child benefit during periods when they were lawfully resident in Netherlands was disproportionate. The Social Insurance Bank appealed the Central Appeals Court's judgment to the Supreme Court. On 23 November 2012, the Supreme Court overturned the judgment of the Central Appeals Court and affirmed the judgment of the District Court of Amsterdam of 9 December 2009.

2.4 Because of the denial of her application for general child benefit, the author and her daughter lived in poverty. On 14 August 2006, the author applied for supplementary benefits from the Municipality of Amsterdam. The request was granted for a benefit of €208.71 per month until a decision had been taken on the author's application for a residence permit. In 2007, this benefit was replaced by a payment for the author's daughter from the Central Agency for the Reception of Asylum Seekers under the Payments to Certain Categories of Aliens Regulation which had come into force on 1 January 2007. In 2007, this benefit was €215.33 per month and in 2008, it reached €217.77 per month. On 1 September 2008, the Agency stopped the payments because the author and her daughter

[1] In a medical report enclosed with the complaint, it is noted that the daughter has "spastic paralysis of the limbs" and a developmental disability.

had lost the "pending proceedings" immigration status, as their application for residence permits was no longer pending. The author appealed the Agency's decision; however, her appeal was rejected by the Regional Court of The Hague on 24 February 2009.

2.5 The author and her daughter were dependent on the author's father for food and on benefactors such as her father's employer and the daughter's school for the therapy and provisions needed for her daughter. The father's employer paid for the special facilities that the daughter needed, namely a walker, a special chair and a wheelchair. The school covered the costs of therapy, while her diet was covered by a charity financed by the State party. The Municipality of Amsterdam had initially refused to cover the costs for a shower chair and a stair lift. However, after an appeal, on 11 August 2008 the municipality agreed to cover these costs. On 23 April 2009, the municipality granted the author a social security benefit to cover the costs of rent and fuel for the period 25 July 2008 to 31 May 2009 at the rate of €144 per month and granted a social security supplement from 25 July 2008 at €110.81 per month. The municipality had already decided to grant that benefit for the period 14 June 2008 to 25 July 2008 on 30 September 2008. The author was deprived of any social security on her own account, and what was provided by the State party did not allow her and her daughter to live at a minimum subsistence level.

The complaint

3.1 The author argues that the general child benefit should be considered a means of fulfilling the State party's obligations under articles 23 and 24 of the Covenant. The author claims that by denying her application for a general child benefit based on her residence status, the State party discriminated against her and her daughter and disregarded the best interest of the child, in violation of articles 23, 24 and 26 of the Covenant. She argues that the special circumstances of her case that were beyond her control should have been taken into account by the domestic authorities, including the facts that she and her daughter could not leave the State party because of her daughter's health status; that the proceedings to obtain residence permits took several years; and that the denial of the general child benefit to the author forced her and her daughter to live in poverty.

3.2 The authorities also did not take into account that the author did not try to avoid the immigration regulations or policies. She approached the authorities openly upon her arrival and requested a residence permit based on her daughter's medical conditions. For the majority of their stay in the State party, the author's and her daughter's residence status was "pending proceedings", which made their residence lawful while their application for a residence permit was being processed.

State party's observations on admissibility and the merits

4.1 In its observations on admissibility and the merits of the communication dated 10 May 2016, the State party noted that the communication was not signed by the author but only by her legal representative and that the power of attorney held by her legal representative was not dated. The State party submits that this raises doubts regarding whether the legal representative was representing the author when the communication was filed. The State party requests that the Committee take this into account in examining the admissibility of the communication.

4.2 The State party provides information on its domestic legislation pertaining to social security benefits and notes that there are two types of social insurance schemes: employee insurance schemes and national insurance schemes. People who are, or used to be, in paid employment are covered by employee insurance schemes. National insurance schemes apply to people who are resident in the Netherlands and people who are in paid employment in the Netherlands and are therefore subject to Dutch salary tax. The General Child Benefit Act is a national insurance scheme. It grants insured persons who care for or support minor children an entitlement to a child benefit. The entitlement to the child benefit therefore accrues to the parents or caregiver, not the child. The child benefit is a contribution to the costs connected with caring for and raising children and is not meant to fully compensate those costs, nor is it intended to be a general income support scheme. The child benefit is financed from general public funds and is paid on a quarterly basis. The benefit is determined using a basic amount that is adjusted twice a year in line with general

price levels and depends in part on the age of the child on the first day of the calendar quarter in question. Entitlement to the benefit in a calendar quarter exists if the applying parent or caregiver is insured under the Act on the first day of that quarter. It is a basic principle of the Act that everyone who is resident in the Netherlands, or who is employed to work in the Netherlands and is subject to salary tax on that basis, is insured under the Act. Aliens who have not been admitted to the Netherlands are not insured under the Act.

4.3 The 1998 Social Entitlements Act links entitlement to various benefits, exemptions, permits and licences to lawful residence in the Netherlands. The Act was intended to end an unjust and undesirable situation in the Netherlands. In the 1970s and 1980s many aliens who were not entitled to reside in the Netherlands succeeded in prolonging their de facto residence in the country, partly because they were able to claim entitlement to public benefits such as unemployment and social assistance. The Social Entitlements Act links an alien's unconditional residence status to their entitlement to public benefits. An alien who has only been admitted for a temporary stay cannot claim such.

4.4 Aliens who are lawfully resident in the Netherlands because they are awaiting the decision on their residence application are not denied all forms of social provisions or benefits. Although they cannot derive any rights from the regular social security system, alternative provisions are available to them. Under the Certain Categories of Aliens Order, aliens who are not asylum seekers are provided with the necessary means of subsistence, in the form of a financial allowance and a medical expenses scheme. Under these arrangements, specific financial provision has been made for minors, a particularly vulnerable group. Thus, the most basic provisions, such as health care that is medically necessary, are available to every alien residing in the Netherlands. Furthermore, persons under the age of 18 are entitled to education regardless of whether they hold a residence permit. Legal aid will also be available regardless of residence status.

4.5 On 13 June 2006, the author applied for a residence permit for her daughter on medical grounds. This application was denied by the Immigration and Naturalization Service on 7 November 2006. On 14 November 2006, the author submitted a notice of objection and lodged a request for interim relief with the District Court of The Hague. On 29 May 2007, the Court, sitting in Amsterdam, granted the request for interim relief, meaning that the author would not be expelled until a decision had been taken on her application for review. During that time, the author and her daughter were lawfully residing in the Netherlands under the Aliens Act 2000 and thus qualified for a financial allowance under the Certain Categories of Aliens Order. On 15 September 2009, an Immigration and Naturalization Service objections committee interviewed the author about her objection. At this committee hearing it became clear that the case involved a highly exceptional combination of factors. On the same date, the author and her daughter were granted residence permits due to exceptional individual circumstances by a discretionary ministerial decision taken pursuant to the Aliens Act 2000. The residence permits were valid for one year and were subsequently extended for one more year. On 26 October 2010, the author and her daughter acquired Dutch nationality. The "option procedure" they utilized is a short, straightforward way for people like the author, who previously possessed Dutch nationality as a result of her birth in Suriname prior to 1975, to reacquire it. The author's daughter, who did not previously possess Dutch nationality, was included in the author's application under the option procedure.

4.6 From 1 January 2007 to 15 October 2009, the author and her daughter received a financial allowance, amounting in total to €7,313.30 under the Certain Categories of Aliens Order. After their residence permits were issued, the Social Insurance Bank granted the author's child benefit application on 25 November 2009, starting from 1 October 2009.

4.7 With respect to the author's argument that denying the general child benefit to her and her daughter when they did not have residence permits violated their rights under articles 23, 24 and 26 of the Covenant, the State party argues that it is common for such distinctions to be made on the basis of residence status and, consequently, nationality.[2] Not

[2] The State party refers to article 1 of the European Convention on Social and Medical Assistance and to article 1 (1) of the appendix to the revised European Social Charter.

all forms of unequal treatment are prohibited under the Covenant, only unequal treatment that constitutes discrimination. In the present case, the distinction is based primarily on residence status and the fact that there is sufficient justification for it. States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment, and the scope of the margin of appreciation varies according to the circumstances, the subject matter and its background. The Social Entitlements Act supports Dutch immigration policy. Linking social entitlements to residence status seeks to prevent aliens who are residing in the Netherlands unlawfully or who are lawfully resident solely on the basis of a pending application for a residence permit from prolonging their residence or establishing the appearance of lawful residence, so that once their procedure is complete it is not possible to expel them. Other individual schemes create entitlements to provisions, benefits and payments for aliens who are lawfully resident on the basis of a pending application for a residence permit. While the author had a pending application, she benefited from an order allowing the provision of the basic necessities at that time.

4.8 An unqualified obligation to treat aliens without legal residence status equally with a country's own nationals and individuals who have been admitted to the country would deprive a State of the ability to pursue an immigration policy to protect the country's economic well-being. Immigration policy is primarily an issue dealt with at the level of national States. It would run counter to this principle if States were obliged to recognize the same rights for those who reside in their territory unlawfully, thereby prolonging the unlawful situation and preventing the State from striking a fair balance between the public interest and the personal interests of the individuals involved. States have the right under international law to control the entry, residence and expulsion of aliens. The State party refers to the European Court of Human Rights judgment in *Nacic and others v. Sweden*,[3] in which the Court found that measures aimed at ensuring the effective implementation of immigration controls sought to preserve the economic well-being of a country and therefore served a legitimate aim within the meaning of article 8 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The State party argues that in weighing the public interest and the individual interest, limiting the entitlement to full social benefits to those who are lawfully resident in the Netherlands is objective and reasonable. This is valid even if individuals have resided for a long period with the knowledge of the State. The fact that someone resides in the Netherlands for a long time without holding a valid residence permit is not an inherent and immutable personal characteristic, but is subject to an element of choice. The public interest is to eliminate the ability to claim benefits absent a valid residence permit, which may otherwise create the opportunity to prolong what in principle is an unlawful residence.

4.9 With respect to the author's claims under article 23 of the Covenant, the State party argues that this provision does not entail an obligation to provide child benefits. Regarding the author's claim of living in poverty as a result of not receiving the child benefit, the State party argues that the general child benefit is not a general income support scheme and is not paid to families with children as a way of providing them with a minimum level of subsistence.

4.10 With respect to the author's claims under article 24 of the Covenant, the State party argues that under this provision, parents have primary responsibility, including financial responsibility, for their children and the provision cannot be read to obligate a State to provide child benefits. In this connection, the State party notes that the general child benefit does not constitute an entitlement conferred on the child. Under the Dutch social security system, children only benefit from social security indirectly, as the social security benefits are granted to the parents and caregivers.

Author's comments on the State party's observations

5.1 On 27 June 2016, the author submitted her comments on the State party's observations. With respect to the State party's argument that the general child benefit is not

[3] See European Court of Human Rights, *Nacic and others v. Sweden* (application No. 16567/10), judgment of 15 May 2012, para. 79.

a general income support scheme, she argues that need is assumed under the scheme and that it thus performs the function of providing families with a minimum level of subsistence.

5.2 She further argues that the amount paid to her under the Certain Categories of Aliens Order regulation of €218 per month was far below the minimum level of subsistence required to live in the Netherlands. She reiterates her submission of 10 June 2013 and argues that the circumstances in her and her daughter's case were exceptional and thus warrant granting her application for the general child benefit.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee notes the State party's submission that the power of attorney held by the author's counsel is not dated and therefore raises doubts as to whether counsel represents the author in the present communication. The Committee notes, however, that the power of attorney, as signed by the author, authorizes her counsel to submit an individual complaint on her behalf before the Committee and to represent her in the proceedings before the Committee. The Committee therefore considers that it is not precluded by article 1 of the Optional Protocol from examining the complaint.

6.5 In the absence of any other challenges to the admissibility of the communication, the Committee declares the author's claims under articles 23, 24 and 26 of the Covenant admissible and proceeds with its consideration of the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's argument that by denying her application for a general child benefit based on her pending residence status, the State party discriminated against her and her daughter in violation of their rights under articles 23, 24 and 26 of the Covenant. It further notes the State party's argument that limiting the entitlement to full social benefits to those who are lawfully resident in the Netherlands serves a legitimate aim and is objective and reasonable.

7.3 The Committee recalls its jurisprudence, in which it has held that although a State party is not required by the Covenant to adopt social security legislation, if it does so, such legislation and the application thereof must comply with article 26 of the Covenant.[4]

7.4 The Committee recalls its general comment No. 18 (1989) on non-discrimination in which it stated that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground

[4] See *Oulajin and Kaiss v. Netherlands* (CCPR/C/46/D/406/1990), para. 7.3; *Oulajin and Kaiss v. Netherlands* (CCPR/C/46/D/426/1990), para. 7.3; *Broeks v. Netherlands* (CCPR/C/29/D/172/1984), para. 12.4; *Zwaan-de-Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 12.4; *Vos v. Netherlands* (CCPR/C/35/D/218/1986), para. 11.3; *Pauger v. Austria* (CCPR/C/44/D/415/1990), para. 7.2; and *Sprenger v. Netherlands* (CCPR/C/44/D/395/1990), para. 7.2.

such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[5] However, not every differentiation in treatment based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria and is in pursuit of an aim that is legitimate under the Covenant.[6] The test for the Committee therefore is whether the differential treatment of the author and her daughter in access to social benefits meets the criteria of reasonableness, objectivity and legitimacy of aim.[7]

7.5 In the present case, the Committee notes that the State party made a distinction regarding entitlement to the general child benefit on the basis of alien residence status. That rule was applied equally to all applicants for the general child benefit who did not have a residence permit in the State party. The Committee also notes that on 13 June 2006, the author applied for a residence permit for her daughter on medical grounds and that the District Court of The Hague granted the author's request for interim relief on 29 May 2007, entitling her and her daughter to lawful residence in the Netherlands while their applications for residence permits were pending. The Committee further notes the State party's argument, which is not contested by the author, that from 1 January 2007 the author and her daughter thus qualified for alternative provisions to the social insurance scheme for non-resident aliens under the Certain Categories of Aliens Order, which makes specific financial provision for minors. The author and her daughter accordingly were entitled to financial allowances, a medical expenses scheme, access to education for the author's daughter and legal aid. The Committee notes that the author has not demonstrated that the alternative financial assistance available to them materially disadvantaged her daughter's health, in comparison to the general child benefit scheme. In the light of these circumstances, the Committee considers that the author has not demonstrated how the differential treatment of her and her daughter failed to meet the criteria of reasonableness, objectivity and legitimacy of aim. The Committee therefore concludes that the facts before it do not disclose a violation of the author's and her daughter's rights under article 26 of the Covenant.

7.6 Based on the above findings, the Committee further considers that the author has failed to establish that by denying her application for a general child benefit, the State party violated her and her daughter's rights under articles 23 and 24 of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it does not disclose a violation by the State party of the author's and her daughter's rights under articles 23, 24 and 26 of the Covenant.

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[5] See general comment No. 18, para. 7.

[6] Ibid., para. 13. See also *G v. Australia*, para. 7.12; *Zwaan-de-Vries v. Netherlands*, para. 13; *Drda v. Czech Republic* (CCPR/C/100/D/1581/2007), para. 7.2; *Broeks v. Netherlands*, para. 13; *Danning v. Netherlands* (CCPR/C/29/D/180/1984), paras. 13–14.

[7] See *G v. Australia*, para. 7.12.